In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1610

IRVING GREENSPHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The issue is whether petitioner was properly convicted of mail fraud despite the claim that the corporate victim suffered no actual loss and the allegation that petitioner's kickback payments to the victim's employee were in response to extortionate threats made by the employee.

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on eighteen counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to imprisonment for 6 months; he was also fined $1,000 on each count. The court of appeals affirmed (Pet. App. A.).

1. The pertinent facts are set forth in the opinion of the court of appeals. In 1961, co-defendant Peter Yonan was hired by the Zenith Corporation as a buyer in the cabinet division of Zenith's purchasing department. When, in 1966, Zenith devised its plans for a new cabinet

known as the "circle of sound," Yonan had the responsibility of finding a supplier for the new cabinet and negotiating the price for furnishing the cabinets. The supplier chosen was the Accurate Box Corporation, owned by petitioner, a friend of Yonan's, and the sole bidder on the Zenith contract. From 1966 to 1970 Accurate Box continued to be the sole bidder on this lucrative Zenith contract. Zenith believed that Accurate Box's price was fair and reasonable, but in the absence of other bidders could not conclude they were competitive. The profit margin to Accurate Box was within the 10 percent profit Zenith usually allowed suppliers.

Late in 1967 Yonan made certain comments to petitioner which led the latter to believe that unless he furnished Yonan with a kickback, he might lose the Zenith business. Although aware of Zenith's written policy providing that suppliers were not to give gratuities to purchasing department employees, petitioner agreed to pay Yonan kickbacks disguised as payments to A & G Woodworking Company, which was owned by a mutual friend, Andrew George. Beginning in December 1967, Accurate Box received fictitious commission invoices from A & G Woodworking Company and paid out more than $300,000 in this manner. By December 1970, more than $100,000 was paid to Yonan. The financial records of Accurate Box were altered to reflect payments to A & G Woodworking of 3.4 percent on monies received from Zenith.

2. Petitioner claims that the mail fraud statute was not violated because Zenith suffered no actual loss. This argument is based upon the unfounded assumption that since Zenith normally permitted its suppliers a 10 percent profit, and cost studies made by that company verified that Accurate Box's price and quality were

acceptable and well within Zenith's guidelines, no loss can be said to have been incurred by Zenith as a result of the kickback scheme. The opinion of the court of appeals (Pet. App. 7-10), on which we rely, correctly notes that in a prosecution under 18 U.S.C. 1341, where the gravamen of the offense is a "scheme to defraud," it is unnecessary for the government to prove that the victim suffered an actual loss; moreover, Zenith was in fact defrauded since Yonan failed to negotiate the best prices possible for Zenith.[1] As a result, Zenith's payments included more than $300,000 which petitioner was prepared to forego while servicing Zenith. The fact that the contract price was acceptable to Zenith under its general profit margin policy does not preclude a showing of financial loss. Certainly Zenith would have been most receptive to an offer from petitioner containing a lesser profit.

Petitioner argues that he lacked the requisite intent on the ground that he was the victim of extortion. This argument has also been examined thoroughly and correctly rejected by the court of appeals (Pet. App. 12-13). As the court pointed out, petitioner had no contractual agreement entitling him to continue selling cabinets to Zenith. If he feared that Yonan might improperly deprive him of Zenith's business and wrongfully shift the cabinet business to a competitor, he could have reported the threat to Zenith; in any event, by his own admission, petitioner was not actually threatened by Yonan with economic harm.

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[1] Petitioner's reliance upon *Epstein* v. *United States*, 174 F. 2d 754 (C.A. 6), for the proposition that payments to an employee amount only to constructive fraud not within the mail fraud statute, is fully answered in the opinion of the court below (Pet. App. 8, n.5).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1973.

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